CHINA AIRLINES LTD.

v.

MALTRAN AIR CORP. SDN. BHD. & ANOTHER APPEAL

FEDERAL COURT, KUALA LUMPUR
DATUK CHONG SIEW FAI CJ (SABAH & SARAWAK)
DATO' PEH SWEE CHIN FCJ
DATO' PADUKA MOHAMED DZAIDDIN ABDULLAH FCJ
[CIVIL APPEALS NOS: 02-5-1994 & 02-747-1993]
24 MAY 1996

CIVIL PROCEDURE: *Damages - Assessment of damages - Assessment made before hearing arguments on quantum - Whether trial Judge had erred in law.*

CIVIL PROCEDURE: *Appeal - Interference by appellate Court - Findings of fact - Whether appellate Court should disturb - General rule - Finding of a specific fact - Credibility of witnesses - Impression formed by Court.*

CIVIL PROCEDURE: *Appeal - Interference by appellate Court - Findings of fact - When should appellate Court interfere - Inferences drawn from other facts - No question of credibility of witnesses.*

EVIDENCE: *Appeal - Interference with findings of fact - When should appellate Court interfere - Failure to consider contemporaneous documents and conduct of parties - Whether trial Judge had misdirected herself.*

CONTRACT: *Guarantee - Banker's guarantee - Performance bond - Conditional performance bond - Unconditional or 'on demand' performance bond - Differences - Whether necessary for beneficiary to prove default - Whether necessary for beneficiary to inform bank.*

BANKING & FINANCE: *Securities for advances - Performance bond - Whether conditional or 'on demand' guarantee - Differences in enforcement - Whether written demand alone sufficient - Whether beneficiary must prove default - Whether beneficiary must inform bank on basis provided for in guarantee - Whether qualifying words in guarantee fulfilled.*

CONTRACT: *Termination - Whether unilateral termination lawful - Interpretation of terms - 'Insolvent'.*

WORDS & PHRASES: *'Insolvent'.*

The two appeals herein arose from the decision of the High Court in two consolidated actions. In the first appeal, the appellant, China Airlines Ltd. ('China Airlines'), was appealing from the decision of the trial Judge in ordering it to pay its Malaysian agent, Maltran Air Corp. Sdn. Bhd. ('Maltran'), the

sum of RM1,679,097.49, being the sum held due and owing to Maltran under China Airlines' incentive bonus scheme ('the scheme') for the years 1986, 1987, 1988, and 1989.

In the second appeal, the appellant, Maltran, was appealing from the decision of the trial Judge in ordering it to pay China Airlines the sum of RM814,171.14, and in dismissing its other claim against China Airlines. Maltran also appealed against the dismissal of its claim against the second respondent, Perwira Habib Bank Bhd. ('Perwira'), in respect of the banker's guarantee given by Perwira to China Airlines.

The material facts were that in June 1982, China Airlines appointed Maltran as its general sales agent ('GSA') for the northern states of Peninsular Malaysia, and to that end, an agreement ('GSA1') was executed. In September 1983, Maltran was appointed as GSA for Kuala Lumpur, and an agreement ('GSA2'), on a year-to-year basis, was executed. This appointment was renewed for the years 1984 and 1985. However, GSA2 was not renewed for 1986, and instead, Maltran was appointed as a passenger sales agent ('PSA'), to which end, an agreement ('PSA1') was executed.

Three written agreements in respect of the scheme were also executed by both parties for the years 1987, 1988, and 1989, but not for 1986. These agreements did not specify the geographical areas for which Maltran was to be entitled under the scheme.

Under the GSA agreements, Maltran accepted the unconditional responsibility for the payment of all sums due to China Airlines, a responsibility in consequence of which it undertook to provide China Airlines with a bank guarantee ('the guarantee'). Thus, in July 1989, Perwira undertook, by a letter of guarantee, to pay China Airlines the sum of RM400,000, on demand, for the due performance by Maltran of the covenants under the GSA agreements.

In September 1989, China Airlines terminated GSA1 as a result of Maltran's failure to settle the accumulated amount for the tickets it had purchased form China Airlines. Subsequently, China Airlines demanded, and obtained, the RM400,000 under the guarantee from Perwira.

The trial Judge held that: (i) Maltran was entitled to the incentive bonus since 1986; (ii) Maltran was entitled to the incentive bonus as a GSA as well as a PSA; (iii) GSA1 was lawfully terminated; and (iv) the guarantee was an 'on demand' guarantee but to be construed as a conditional one.

The legal issues which arose on appeal were: (1) whether the trial Judge had erred in deciding on the issue of quantum when the parties had agreed to reserve their examination on Maltran's loss of income until after the issue on liability was decided; (2) whether an appellate Court can interfere with the factual findings of a Court below it; and (3) the distinction between an 'on demand' guarantee and a conditional guarantee.

Held:

Per Mohamed Dzaiddin Abdullah FCJ (delivering the judgment of the Court):

[1] The trial Judge was wrong in making the assessment on loss of income without hearing the parties first, especially when the argument on quantum, as opposed to that on liability, had been postponed until after the conclusion of the taking of evidence on liability.

[2] It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the factual findings of the Court below be disturbed by the appellate Court unless it appears that those findings are clearly wrong; and it is even more undesirable to do so where the conclusions reached, to a large extent, depended on the credibility of the witnesses and the impression formed by the Court which has seen them and judged their honesty and accuracy.

[3] However, there is clear authority that a distinction can be drawn between the finding of a specific fact which depends upon the credibility of witnesses, and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate Court will more readily interfere with the trial judge's findings of fact and form an independent opinion. Thus, in cases where there is no question of the credibility or reliability of any witness, or where the point in dispute is the proper inference to be drawn from proved facts, an appeal Court is generally in as good a position to review and evaluate the evidence as the trial Judge. In the instant appeal, there was nothing in the trial judge's judgment which indicated that her decision was based on the credibility of the witnesses or the impression she formed of them.

[4] The trial Judge had misdirected herself in not considering the relevant evidence from which the conclusion, that it was more probable that Maltran was not entitled to the incentive bonus for 1986, could have been drawn. Furthermore, she had failed to give sufficient or any consideration to the contemporaneous documents and the conduct of the parties, which would have led her to the inescapable inference that Maltran was only entitled to the incentive bonus as a PSA.

[5] The word 'insolvent' as used in the GSA agreements could not have any technical meaning ascribed to it as it has no such meaning in the Bankruptcy Act 1967 wherein only the word 'bankrupt' is employed. By popular usage, 'insolvent' means being 'unable to pay one's debts or discharge one's liabilities.' Therefore, as Maltran was unable to pay its outstanding debt to China Airlines, it must be deemed to be insolvent. Consequently, China Airline's termination of the GSA agreements was lawful.

[6] A bank guarantee is a performance bond. There are two types of performance bonds. The first is a conditional performance bond whereby the guarantor becomes liable upon proof of a breach of the terms of the principal contract by the principal and the beneficiary sustaining loss as a result. The second is an unconditional or 'on demand' performance bond which is so drafted that the guarantor becomes liable merely when a demand is made upon him by the beneficiary with no necessity for the beneficiary to prove any default on the part of the principal in the performance of the principal contract. The tendency of the English courts has been to treat performance bonds as unconditional if there was a clear statement that the amount guaranteed was payable by the bank simply upon a written demand being made, even though there might be some indications to the contrary elsewhere in the document.

[7] Although the trial Judge recognised that the guarantee was an 'on demand' guarantee, she had construed it as a conditional guarantee. Nevertheless, she had applied the correct approach, ie, that in addition to the beneficiary of the performance bond making a demand, he must also inform the bank that he does so on the basis provided for in the performance bond itself. Therefore, the payment made by Perwira in favour of China Airlines under the guarantee was lawful.

[Appeal by China Airlines allowed with costs, and the High Court's order set aside. Appeal by Maltran dismissed with costs.]

***[Bahasa Malaysia** Translation of Headnotes]*

***PROSEDUR SIVIL:** Gantirugi - Taksiran gantirugi - Taksiran dibuat sebelum mendengar hujahan atas kuantum - Samada Hakim perbicaraan telah tersalah pertimbangan di sisi undang-undang.*

***PROSEDUR SIVIL:** Rayuan - Campur tangan oleh Mahkamah rayuan - Keputusan fakta - Samada Mahkamah rayuan seharusnya mengganggu - Kaedah umum - Keputusan fakta yang khusus - Kebolehpercayaan saksi - Tanggapan yang dibentuk oleh Mahkamah.*

***PROSEDUR SIVIL:** Rayuan - Campur tangan oleh Mahkamah rayuan - Keputusan fakta - Bilakah seharusnya Mahkamah rayuan mencampuri - Inferens dihasilkan daripada fakta-fakta lain - Tidak terdapat persoalan mengenai keboleh-percayaan saksi.*

***KETERANGAN:** Rayuan - Campur tangan dalam keputusan fakta - Bilakah seharusnya Mahkamah rayuan mencampuri - Kegagalan untuk menimbangkan dokumen-dokumen semasa dan kelakuan pihak-pihak - Samada Hakim perbicaraan telah tersalah-arah dirinya sendiri.*

KONTRAK: *Gerenti - Gerenti jurubank - Bon perlaksanaan - Bon perlaksanaan bersyarat - Perbezaan - Samada perlu bagi benefisiari untuk membuktikan keingkaran - Samada perlu bagi benefisiari untuk memaklumkan bank.*

PERBANKAN DAN KEWANGAN: *Jaminan-jaminan bagi pendahuluan - Bon perlaksanaan - Samada gerenti bersyarat atau "on demand" - Perbezaan dalam penguatkuasaan - Samada benefisiari mesti membuktikan keingkaran - Samada benefisiari mesti memaklumkan bank atas dasar yang diperuntukan dalam gerenti - Samada perkataan-perkataan kelayakan dalam gerenti dipenuhi.*

KONTRAK: *Penamatan - Samada penamatan satu pihak sah di sisi undang-undang - Pentafsiran terma-terma - "Insolvent".*

PERKATAAN & ISTILAH: *"Insolvent".*

Kedua-dua rayuan di sini berbangkit daripada keputusan Mahkamah Tinggi dalam dua tindakan yang bergabung. Dalam rayuan yang pertama, perayu, China Airlines Ltd. (China Airlines), merayu terhadap keputusan Hakim perbicaraan dalam memerintahkannya supaya membayar ejennya di Malaysia, Maltran Air Corp Sdn. Bhd. (Maltran), jumlah sebanyak RM1,679,097.49 yang merupakan jumlah yang telah diputuskan terhutang dan kena dibayar kepada Maltran di bawah tahun-tahun 1986, 1987, 1988 dan 1989.

Dalam rayuan yang kedua, Maltran, merayu terhadap keputusan Hakim perbicaraan dalam memerintahkannya supaya membayar China Airlines jumlah sebanyak RM814,171.14, dan dalam menolak tuntutannya yang lain terhadap China Airlines. Maltran telah juga merayu terhadap penolakan tuntutannya terhadap responden kedua, Perwira Habib Bank Bhd. (Perwira), berhubung dengan gerenti jurubank yang telah diberikan oleh Perwira kepada China Airlines.

Fakta-fakta material adalah bahawa dalam bulan Jun 1982, China Ailines telah melantik Maltran sebagai ejen jualan amnya ("GSA") bagi negeri-negeri utara Semenanjung Malaysia, dan bagi tujuan itu, satu perjanjian ("GSA1"), telah disempurnakan. Dalam bulan September 1983, Maltran telah dilantik sebagai GSA bagi Kuala Lumpur, dan satu perjanjian ("GSA2"), atas dasar tahun ke tahun, telah disempurnakan. Perlantikan ini telah diperbaharui bagi tahun-tahun 1984 dan 1985. Walaubagaimanapun, GSA2 telah tidak diperbaharui bagi tahun 1986, sebaliknya, Maltran telah dilantik sebagai ejen jualan penumpang ("PSA"), bagi yang mana, satu perjanjian ("PSA1") telah disempurnakan.

Tiga perjanjian bertulis berhubung dengan skim tersebut telah juga disempurnakan oleh kedua-kedua pihak bagi tahun-tahun 1987, 1988 dan 1989, tetapi tidak bagi tahun 1986. Perjanjian-perjanjian ini tidak menentukan kawasan-kawasan geografi bagi yang mana Maltran adalah berhak di bawah skim tersebut.

Di bawah perjanjian-perjanjian GSA, Maltran telah menerima tanggungjawab yang tidak bersyarat bagi pembayaran kesemua jumlah yang kena dibayar kepada China Airlines, suatu tanggungjawab yang mana akibat daripadanya ianya telah mengakujanji untuk memperuntukkan bagi China Airlines dengan satu gerenti bank ("gerenti tersebut"). Dengan itu, dalam bulan Julai 1989, Perwira telah mengakujanji, melalui sepucuk surat gerenti, untuk membayar China Airlines jumlah sebanyak RM400,000, ketika dituntut, bagi perlaksanaan oleh Maltran akan waad-waad di bawah perjanjian GSA tersebut.

Dalam bulan September, 1989, China Airlines telah menamatkan GSA1 akibat kegagalan Maltran untuk menjelaskan jumlah terkumpul bagi tiket-tiket yang telah dibeli daripada China Airlines. Berikutan itu, China Airlines telah menuntut, dan mendapatkan, RM400,000 tersebut di bawah gerenti daripada Perwira.

Hakim perbicaraan telah memutuskan bahawa: (i) Maltran adalah berhak kepada bonus galakan sejak 1986; (ii) Maltran adalah berhak kepada bonus galakan sebagai GSA dan juga sebagai PSA; (iii) GSA1 telah ditamatkan secara sah di sisi undang-undang; dan (iv) gerenti tersebut adalah merupakan gerenti "on demand" tetapi hendaklah ditafsirkan sebagai sesuatu yang bersyarat.

Isu undang-undang yang berbangkit ke atas rayuan adalah: (1) samada Hakim perbicaraan telah tersalah pertimbangan dalam memutuskan mengenai isu kuantum bilamana pihak-pihak tersebut telah bersetuju untuk mengenepikan pemeriksaan mereka ke atas kerugian pendapatan Maltran sehingga selepas isu mengenai tanggungan telah diputuskan; (2) samada Mahkamah rayuan boleh mencampuri keputusan faktual sebuah Mahkamah di bawahnya, dan (3) perbezaan antara gerenti "on demand" dan satu gerenti bersyarat.

Diputuskan:

Oleh Mohamed Dzaiddin Abdullah HMP (Menyampaikan penghakiman Mahkamah):

[1] Hakim perbicaraan adalah salah dalam membuat taksiran mengenai kerugian pendapatan tanpa mendengar pihak-pihak tersebut terdahulu, khususnya ketika hujahan mengenai kuantum, bertentangan dengan tanggungan, telah ditangguhkan sehingga selepas keterangan mengenai tanggungan diambil.

[2] Ianya merupakan prinsip undang-undang yang tetap bahawa dalam sesuatu rayuan, di mana fakta-fakta harus dikaji semula, ianya adalah tidak diinginkan bahawa keputusan-keputusan faktual Mahkamah di bawah diganggui oleh Mahkamah rayuan kecuali ianya didapati bahawa keputusan-keputusan tersebut adalah jelas salah; dan ianya adalah lebih lagi tidak diingini untuk melakukan sedemikian di mana penyelesaian telah pun dicapai, yang secara luasnya, bergantung keatas keboleh-percayaan saksi-saksi dan tanggapan yang dibentuk oleh Mahkamah yang melihat mereka dan menghakimi ketepatan serta kejujuran mereka.

[3] Walaubagaimanapun, terdapat kuasa yang jelas bahawa sesuatu perbezaan boleh dibuat antara keputusan sesuatu fakta yang khusus yang mana bergantung pada keboleh-percayaan saksi-saksi, dan keputusan fakta yang bergantung pada inferens yang dibuat daripada fakta-fakta yang lain. Dalam kes yang terkemudian, sesebuah Mahkamah rayuan akan lebih bersedia untuk mencampuri akan keputusan-keputusan fakta Hakim perbicaraan dan membentuk satu pendapat yang bebas. Dengan itu, dalam kes-kes dimana tidak terdapat persoalan keboleh-percayaan terhadap mana-mana satu saksi, atau di mana hal perkara yang dipertikaikan adalah inferens wajar yang harus dibuat daripada fakta-fakta terbukti, sesebuah Mahkamah rayuan adalah secara amnya mempunyai kedudukan yang sebaiknya untuk mengkaji semula dan menilaikan keterangan tersebut seperti juga Hakim perbicaraan. Dalam rayuan semasa ini, tidak terdapat apa-apa di dalam penghakiman Hakiman perbicaraan yang menunjukkan bahawa keputusannya adalah berdasarkan ke atas keboleh-percayaan saksi-saksi tersebut ataupun tanggapan yang telah beliau bentuk mengenai mereka.

[4] Hakim perbicaraan telah tersalah-arah akan dirinya sendiri dalam tidak menimbangkan keterangan relevan dari mana keputusan, bahawa inya adalah lebih berkemungkinan bahawa Maltran adalah tidak berhak untuk mendapat bonus galakan bagi tahun 1986, mungkin telah dibuat. Seterusnya, beliau telah gagal untuk memberikan apa-apa pertimbangan atau pertimbangan yang sewajarnya kepada dokumen-dokumen semasa dan kelakuan pihak-pihak tersebut, yang mana mungkin akan membawanya kepada inferens yang tidak dapat dielakkan bahawa Maltran adalah hanya berhak kepada bonus galakan sebagai PSA.

[5] Perkataan "insolvent" sepertimana yang digunakan dalam perjanjian-perjanjian GSA tidak mungkin mempunyai apa-apa maksud teknikal yang dianggapkan kepadanya, kerana ianya tidak mempunyai maksud yang sedemikian dalam Akta Kebankrapan 1967 di mana hanya perkataan "bankrupt" digunakan. Menurut penggunaan yang popular, "insolvent" bermaksud "seseorang yang tidak dapat membayar hutangnya atau melepasnya tanggungjawabnya". Dengan itu, oleh kerana Maltran tidak dapat membayar hutangnya yang masih belum jelas kepada China Airlines, ianya haruslah dianggap sebagai insolvent. Akibat itu, penamatan China Airlines akan perjanjian-perjanjian GSA adalah sah di sisi undang-undang.

[6] Sesuatu gerenti bank adalah bon pelaksanaan. Terdapat dua jenis bon pelaksanaan. Yang pertama adalah bon pelaksanaan bersyarat di mana penggerenti menjadi bertanggunggan setelah terbuktinya satu kemungkiran terhadap terma-terma kontrak utama oleh pihak utama dan benefisiari mengalami kerugian akibat daripadanya. Yang kedua adalah bon pelaksanaan yang tidak bersyarat atau bon pelaksanaan "on demand" yang mana dideraf sedemikian rupa bahawa penggerenti tersebut menjadi bertanggungan semata-mata ketika satu tuntutan dibuat keatasnya oleh

benefisiari tanpa keperluan oleh benefisiari tersebut membuktikan apa-apa kemungkiran di pihak utama dalam melaksanakan kontrak utama tersebut. Kecenderungan Mahkamah-Mahkamah Inggeris adalah untuk menganggapkan bon-bon pelaksanaan sebagai tidak bersyarat jika terdapatnya pernyataan yang jelas bahawa jumlah yang digerentikan adalah kena dibayar oleh bank hanya dengan membuat satu tuntutan bertulis, walaupun mungkin akan terdapat beberapa petunjuk yang bertentangan di lain-lain bahagian dalam dokumen tersebut.

[7] Walaupun Hakim perbicaraan telah mengenalpasti bahawa gerenti tersebut merupakan gerenti "on demand", beliau telah mentafsirkannya sebagai gerenti bersyarat. Namun begitu, beliau telah menggunakan pendekatan yang betul, iaitu, sebagai tambahan kepada benefisiari bon perlaksanaan tersebut membuat satu tuntutan, beliau haruslah juga memaklumkan bank tersebut bahawa beliau berbuat sedemikian atas dasar yang diperuntukkan dalam bon pelaksanaan itu sendiri. Dengan itu, pembayaran yang dibuat oleh Perwira bagi pihak China Airlines di bawah gerenti tersebut adalah sah di sisi undang-undang.

[Rayuan oleh China Airlines dibenarkan dengan kos, dan perintah Mahkamah Tinggi diketepikan. Rayuan oleh Maltran ditolak dengan kos.]

Cases referred to:
Crofter Harris Tweed Co. v. Veitch [1942] 1 All ER 142 HL ***(refd)***
Watt or Thomas v. Thomas [1947] AC 484 ***(refd)***
Benmax v. Austin Motor Co. Ltd. [1955] AC 370 ***(foll)***
Tay Kheng Hong v. Heap Moh Steamship Co. Ltd. [1964] 30 MLJ 87 ***(refd)***
Esal (Commodities) Ltd. & Anor. v. Oriental Credit Ltd. & Anor. [1985] Llyod's Rep 546 ***(foll)***
Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn. Bhd. [1995] 1 CLJ 149 ***(cit)***
I.E Contractors Ltd. v. Llyod's Bank Plc [1990] 51 BLR 1 ***(foll)***

Legislation referred to:
Bankruptcy Act 1967 s. 3(1)

Other sources referred to:
The Modern Contract of Guarantee, 2nd Edn., p. 664
The Shorter Oxford English Dictionary

(Civil Appeal No. 02-5-94)
For the appellant - N. Chandran (Ranjit Singh with him); M/s. Adnan Sundra & Low
For the 1st respondent - Manjit Singh (Ngeow Yin Ngee with him); M/s. Ngeow & Maurice Gomez
For the 2nd respondent - S. Nantha Balan; M/s. Shook Lin & Bok

(Civil Appeal No. 02-747-93)
For the appellant - Manjit Singh (Ngeow Yin Ngee with him); M/s. Ngeow & Maurice Gomez
For the respondent - N. Chandran (Ranjit Singh with him); M/s. Adnan Sundra & Low

JUDGMENT

Mohamed Dzaiddin Abdullah FCJ:

These two appeals arose from the decision the High Court (Commercial Division) Kuala Lumpur in two consolidated actions given on 7 December 1993. In Rayuan Sivil No. 02-747-1993, China Airlines Limited (China Airline) was dissatisfied with part of the decision of the learned Judge who ordered China Airline to pay to the respondents, Maltran Air Corporation Sdn. Bhd. (the agent) a sum of RM1,679,097.49 with interest at the rate of 8% per annum from 11 September 1989 date of full payment. The Judge held that this amount represented the sum due and owing by China Airline to the agent under the Airline's incentive bonus scheme for the years 1986, 1987, 1988 and 1989.

The second appeal, Rayuan Sivil No. 02-5-1994 was brought by the agent who was dissatisfied with the decision of the trial Judge in dismissing its other claim against China Airline, in particular against the order of the Court that it was liable to pay to China Airline the sum of RM814,171.14 with interest. The agent was also dissatisfied with the order dismissing its claim against Perwira Habib Bank Berhad, the second respondent, with respect to the Banker's Guarantee given by the bank to China Airline, undated but valid from 10 August 1989 to 9 August 1990. We propose to deal with these appeals separately.

Factual background

China Airline is a foreign incorporated company registered in Malaysia as a foreign company under Part XI of the Companies Act 1965, whose main object is to carry on air transport business of China Airlines Ltd. (incorporated in Taipeh, Republic of China) in Malaysia. The agent is a locally incorporated company having its registered office at 410, Kompleks Antarabangsa, Kuala Lumpur and since 1 January 1982 sold airline tickets for China Airline in Malaysia. It seemed that for the first half of 1982, the agent brought in USD350,000 worth of business. In return for the good performance by the Agent, China Airline appointed the agents as its General Sales Agent (GSA) for the Northern States of West Malaysia, namely, Penang, Kedah, Perlis, Perak, Kelantan, Trengganu and Pahang. On 21 June 1982, the GSA agreement, AB2-15, was executed between the parties in Taipeh. Loh Cheng Hoe (PW1), the Managing Director of the agent, signed for the agent, while one Eugene Chen, the Airline's Sales & Marketing Director, for China Airline. Later, in October 1982, the GSA was extended to Johor Bahru. Due to the increased volume of airline business in Kuala Lumpur, China Airline agreed to appoint the agent as its GSA for Kuala Lumpur with effect from 1 September 1983. An agreement AB19 was then executed. As AB19 was expressed to be on a year to year basis, upon its expiry on 31 August 1984, the agent's appointment as GSA for Kuala Lumpur was further renewed for 1984 and 1985. The agreement for 1985 would expire on 31 August 1986.

However, on 4 July 1986, the agent was notified by letter that China Airline would not renew its appointment as GSA for Kuala Lumpur after 1 September 1986 although this notice did not affect other areas. Following the non-renewal of the GSA agreement for Kuala Lumpur, the agent was instead appointed merely as the Passenger Sales Agent (PSA). An agreement dated 1 September 1986, AH2-4, was duly executed in Taipeh. It is to be noted that although the agreement did not provide the area of operation, the agent had maintained that the PSA was for Kuala Lumpur only.

Meanwhile, under article VII(1) of the GSA agreement, the agent accepted, *inter alia*, the unconditional responsibility for the payments of all sums due to China Airline and for the due performance of this responsibility, it undertook to provide the Airline with a bank guarantee. Hence, by a Letter of Guarantee no. 005181 stamped on 27 July 1989, the Bank undertook to pay on demand to China Airline the sum of RM400,000 for the due performance of the covenants under the GSA agreement. We shall deal with this Letter of Guarantee in greater detail when we discuss the second appeal. For the moment, suffice it to note that the validity period of the said guarantee was from 10 August 1989 to 9 August 1990.

Turning to the incentive bonus scheme, it is to be noted that this scheme known as Special Bonus On Flown Incentive Quota, was introduced by China Airline exclusively for its agents. Under this scheme, the agents had to achieve three targets, A, B and C as the minimum net sales valued in US dollars. If the targets were achieved within a given year, the agents would be entitled to receive a certain percentage, ranging between 2.5% and 7.0% as bonus over and above any other commission due and payable to the agents by China Airline. The bonus earned in any calender year was, however, payable in the month of March of the following year. Accordingly, the parties hereto executed three agreements, AB22, AB26 and AB29 for the years 1987, 1988 and 1989 providing for the agent's entitlement to the incentive bonus. There was no written agreement for 1986. It is common ground that the three agreements did not specify the areas of the agent's entitlement, i.e. whether for Kuala Lumpur sales or for the whole of Peninsular Malaysia. It is also significant to note that the targets to be achieved by the agent differed from year to year.

With regard to the second appeal, the following facts were not disputed. As a result of the agent's failure to settle the accumulated amount for tickets purchased from China Airline, the latter terminated the GSA agreement, AB2-15. The amount due and owing by the agent to the Airline as at the first half of July 1989 was RM1,503,115.58 (AB40). Despite promises to pay, the agent did nothing to reduce its indebtedness. By a letter dated 8 September 1989, China Airline solicitors gave the agent 48 hours to pay up, failing which they would treat the GSA agreement as being terminated and legal action would follow. The termination was confirmed by the same solicitors in their letter dated 11 September 1989. On 13 September 1989, the solicitors wrote to the

Bank, informing them of the amount owed by the agent and requested for the said sum under the Letter of Guarantee to be paid to them as solicitors for China Airline. Accordingly, on 17 November 1989 the Bank paid out the sum of RM400,000 under the guarantee to China Airline.

1. R.S. No. 02-747-1993 (China Airline Appeal)

There are two grounds of appeal. The first ground can be disposed of quite easily. It was submitted that the learned Judge erred in deciding on the issue of quantum when the parties to the action had agreed to reserve their examinations on the agent's loss of income until after the question of liability was decided. From the notes of proceedings, at p. 129 of Rekod Rayuan A-B, the learned Judge recorded as follows:

> Both Counsel for the lst and 2nd defendants reserve their rights to cross-examine PW1 on the issue of loss of income as parties have agreed that only evidence as to liability will be proceeded with at this juncture.

It seems clear from the foregoing and the postponement of the submission of Counsel on the loss of income, the learned Judge, on her own volition, proceeded to assess the damage, i.e. the claim for incentive bonus. In her judgment (reported in [1994] 1 AMR 2 at p. 72), the learned Judge, found as follows:

> Having decided that the plaintiff is also entitled to incentive bonus on AB2-15 from 1986 until its termination, I now consider the amount that is payable to the plaintiff. In this respect, I rely on AB76-77 which are agreed documents, that shows the calculation of the incentive bonus after due credit is given to AB27, the only incentive bonus given by the first defendant to the plaintiff in 1988 in respect of sales conducted in 1987. To that end, the plaintiff succeeds in its claim for the sum of RM1,676,097.49 as the incentive bonus due for the period 1986-1989.

In the light of the printed evidence, we have no difficulty in coming to our conclusion that the learned Judge was wrong to make the assessment of the loss of income without hearing the parties, especially when the argument on quantum, as opposed to liability, was postponed until after the conclusion of the taking of evidence on liability. We hasten to add that this could only be due to an oversight.

The second ground, which is more substantive, concerned the payment of incentive bonus to the agent. It was the appellant's case here and in the Court below that the agent was not entitled to be paid the incentive bonus for the year 1986, and secondly, the said incentive bonus scheme only applied to sales of tickets by the agent as a PSA and not as a GSA.

On the first issue, the learned Judge found that the agent was entitled to be paid the incentive bonus for the year 1986. Her findings are as follows (*ibid,* at p. 70):

> Coming now to the plaintiff's claim for incentive bonus, **the first issue** raised is when was the plaintiff entitled to such a scheme, for although the first defendant introduced it on 1 January 1986, to increase its business and boost its sales, nonetheless it claims that the scheme was only available to the plaintiff in 1987 as seen from AB27, a credit note stating the amount of incentive bonus due to the plaintiff in 1987. The first defendant also contends that the scheme is only confined to sales conducted in Kuala Lumpur as only a PSA is entitled to an incentive bonus but not the GSA and to that extent, AB22, 26 and 29 relate to sales in Kuala Lumpur only but not to sales in areas where the plaintiff was the GSA.
>
> Despite the first defendant vehemently trying to insist that the plaintiff was only entitled to incentive bonus in 1987, the most telling evidence came from the first defendant's former employee, PW3, and its sales manager, DW3. PW3's evidence is that as the Passenger Sales Supervisor of the first defendant, he had prepared AG126, a list containing the names of 25 agents to whom the first defendant granted incentive bonus. The plaintiff topped this list and unlike the agents listed as Nos 17, 19 20 and 25 who were given incentive bonus in 1987, the plaintiff enjoyed the benefit in 1986. When cross-examined, DW3 admitted that the plaintiff may well have enjoyed the benefit since 1986. In any event, since the introduction of the scheme was to increase the first defendant's business, it does not stand to reason why the plaintiff, who supported the first defendant, was only allowed to enjoy the benefit a year after the other agents did. In this respect, there is again PW3's unchallenged testimony that the agents who enjoyed the incentive bonus in 1987, were those supported other airlines. To that end, I hold that the plaintiff is entitled to incentive bonus since 1 January 1986.

With respect to the agent's entitlement to enjoy the incentive bonus both as a PSA and GSA the learned Judge gave the following reasons (*ibid* p. 71):

> As for the first defendant's contention that the scheme was only applicable to PSA and not to a GSA, AB22, 26 and 29, the 3 incentive bonus agreements for 1987-1989 executed by the plaintiff with the first defendant do not specify the areas nor the type of agent to whom such a scheme was operative. Except for the difference in the amounts of the targets to be achieved all the 3 agreements identify the plaintiff as the agent to benefit from such a scheme, the authority who shall calculate the payments, the documents to be submitted for consideration, the need for secrecy from outsiders, the restriction that the plaintiff should not form a consortium with other agents to achieve their targets and the right given to the first defendant to withdraw or withhold payment on proof that the plaintiff had violated the agreements. All the 3 agreements are the first defendant's own documents and if indeed the agreements are ambiguous as the first defendant contends, then it should have been more explicit when expressing its intentions to paper and on the face of the 3 agreements, I consider that the plaintiff is to enjoy the incentive bonus for so long as the targets are achieved as a PSA as well as a GSA.

Relevant Principles of law

In the light of the above findings of the learned Judge, a fundamental question of principle arises, which is, whether in the circumstances of the case, this Court can interfere with the findings of fact of the Court below. It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the findings of the Court below should be disturbed by a Court of appeal unless it appears that those findings are clearly wrong, and more especially that it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witnesses and the impression formed by a Court which has seen them and can Judge their honesty and accuracy (*Crofter Harris Tweed Co. v. Veitch*) [1942] 1 All ER 142 HL per Lord Porter at p. 167. However, the authority for the above proposition is the speech of Lord Thankerton in *Watt or Thomas v. Thomas* [1947] AC 484, particularly the following passage (at p. 487-8):

> I. Where a question of fact has been tried by Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion;
>
> II. The appellate Court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
>
> III. The appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court.

On the other hand, there is a clear authority also from the House of Lords and followed by the Privy Council, which says that a distinction can be drawn between finding of a specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate Court will more readily interfere with the trial Judge's findings of fact and form an independent opinion than in the case of the former. That authority is the speech of Lord Reid in the House of Lord's decision in *Benmax v. Austin Motor Co. Ltd.* [1955] AC 370, followed later by the Privy Council in the Singapore case of *Tay Kheng Hong v. Heap Moh Steamship Co. Ltd.* [1964] 30 MLJ 87 at p. 94. At p. 376, his Lordship stated:

> *Thomas v. Thomas* was a consistorial case based on cruelty, and I think that the whole passage which I have quoted refers to cases where the credibility or reliability of one or more witnesses has been in dispute, and where a decision on these matters has led the trial Judge to come to his decision on the case as a whole. If that be right, then I see no reason to doubt anything that was said

by Lord Thankerton. **(But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal Court is generally in as good a position to evaluate the evidence as the trial Judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion)**. [Emphasis added].

In *Tay Kheng Hong v. Heap Moh Steamship Co. Ltd. supra*, the Singapore Court of Appeal found there was a considerable volume of independent evidence both documentary and oral which was consistent only with the respondents' case. It held that the trial Judge was wrong in accepting the appellant's evidence. On appeal, the Privy Council held that the Court of Appeal's acceptance of the witness's evidence depended on inferences from documents. However, these inferences were insufficient material to entitle them to reject the result arrived at by the trial Judge.

In the present case, it is apparent to us that the learned Judge based her findings after considering the evidence of the witnesses and the documents and clearly her conclusions were based on inferences drawn from them. In our view, the learned Judge did not make any specific finding of fact based on the evidence of PW3 and DW3 and the documents. Although she accepted the evidence of PW3 and DW3 as the most telling, there was nothing in her judgment which indicated her decision was based on the credibility of the witnesses or as a result of the impression she formed of them. At any rate, we will also show that her acceptance of their evidence was wrong. As for the second issue, her conclusion depended entirely on inferences drawn from the three agreements, AB22, 26 and 29. Since the present case does not involve the question of credibility of the witnesses, we are satisfied, following *Benmax* principle, that we are in as good a position to review and evaluate the evidence of the case as the trial Judge.

Reevaluation of Evidence

On the first issue, the learned Judge relied on the evidence of PW3 and DW3, which she described as the most telling evidence against the Airline that the agent was entitled to incentive bonus for 1986. The crux of PW3's evidence was as follows. He testified that he prepared AG 126, a list containing the names of 25 travel agents for whom the incentive bonus scheme was proposed. The agent's name was first on the list, which was handwritten. Only one copy was prepared. Under cross-examination, he stated he could not remember when he wrote it. Next, he stated that China Airline gave incentive bonus to its 25 agents. The agent was of those given in 1986. Some agents were only given incentive bonus in 1987 because they had earlier supported other airlines. He stated that he had personal knowledge of incentive bonus agreements because they were signed in his presence. It would appear to us that from this evidence the learned Judge accepted PW3's evidence as the "most telling evidence", without considering the fact that he was formerly the Passenger Sales

Supervisor of China Airline, who was dismissed by the Airline in 1987 and who had admitted in evidence that he considered the whole episode of his dismissal as painful. Surely, an inference could be drawn that this witness has an axe to grind and has every reason to be hostile to China Airline and therefore his evidence ought to have been treated with caution. The learned Judge should have also noted that AG126 contained names of the travel agents for whom incentive bonus was only proposed. There was also no explanation from PW3 who prepared the handwritten list why there was no written agreement for payment of bonus for 1986.

With respect to DW3, the learned Judge accepted his evidence because he had admitted under cross-examination that the agent might well have enjoyed the benefit since 1986. In our view, the learned Judge appeared to have overlooked the earlier part of DW3's evidence when he stated: "In 1986, there was incentive bonus but the plaintiff (agent) was not given." Thus, in the light of DW3's answer that the agent might well have enjoyed the bonus since 1986, it was wrong for her to have drawn an inference and to come to the conclusion that the agent was entitled to the incentive bonus for 1986. In our view, the learned Judge should have also considered the following contemporaneous evidence relied by China Airline. It was not disputed that the agent's entitlement for 1987, 1988 and 1989 bonuses were provided for by the three written agreements, AB22, AB26 and AB29. There was no written agreement for 1986. Based on this fact, the proper inference to be drawn was that there was no agreement to pay the agent the 1986 bonus when the agreements for the following three years were in writing. Secondly, if the agent was entitled to the 1986 bonus, why was there no protest or complaint for its non-receipt when the agent received the 1987 bonus of RM21,347.04 (AB27) in March 1988. Thirdly, it was not disputed that the agent was a temporary GSA for Kuala Lumpur in 1986 enjoying an overriding commission of 3%. In our view, it would not be commercially prudent nor would it be probable for the Airline to pay incentive bonus over and above the 3% GSA commission. Based on the above factors, we are of the opinion that the learned Judge has misdirected herself in not considering them upon which the inferences could be drawn that it was more probable that the agent was not entitled to the incentive bonus for 1986.

On the second issue, the learned Judge relied on the content of the three incentive bonus agreements, AB22, 26 and 29 in coming to her conclusion that the agent could enjoy the incentive bonus for so long as the sales targets were achieved by the agent as a PSA and a GSA. The learned Judge recognised that the agreements did not specify the areas nor the type of agent, i.e. a PSA or a GSA. Thus, she found, on a true construction of the agreements, that except for the difference in the amounts of the targets to be achieved by the agent, the said agreements had identified the agent as the agent who would benefit from the scheme, the authority who should calculate the payments, the party who would submit the documents for consideration, the

need for secrecy, etc. From the above facts and coupled with her observation that China Airline should have been more explicit when expressing their intention in a written document, the learned Judge drew the inferences and arrived at her conclusion that the agent was entitled to enjoy the incentive bonus both as a PSA and a GSA.

In our view, there is nothing ambiguous in the three agreements, AB22, 26 and 29. In addition, from the evidence in the Appeal Record, we find the learned Judge failed to give sufficient or any consideration to the following contempoaneous matters. First, it was not disputed that up to 1987, the agent was the GSA for Peninsular Malaysia as well as the temporary GSA for Kuala Lumpur. On 31 August 1986, its status as the temporary GSA for Kuala Lumpur expired and was not renewed. The Airline then introduced the incentive bonus scheme to the agent to compensate for the loss of its status as the GSA for Kuala Lumpur. In our view, it does stand to reason, and quite logically so, that the incentive bonus scheme was only meant for Kuala Lumpur, as opposed to the whole Peninsular Malaysia, since the intention of the scheme was to compensate the loss of GSA status for Kuala Lumpur only after August 1986.

Secondly, the credit note, AB27, clearly stated that it was the incentive bonus payment in respect of Kuala Lumpur branch sales for the period January-December 1987. Hence, the agent must be aware that this incentive bonus was paid for Kuala Lumpur region only. Again, this fact that the bonus was from January-December 1987 and for the sales in respect of Kuala Lumpur only as compensation for the termination of the agent's appointment as GSA for Kuala Lumpur in 1986 was reiterated in the Airline's letter to the agent dated 22 September 1989. In our view, the absence of any complaint or protest regarding the content of AB27 is incosistent with the agent's case.

Thirdly, it would be observed that the sales targets to be achieved by the agent differed for the three years. In AB22, the minimum net sales for Target A was USD200,000 at 2.5% bonus, for Target B USD200,000 - USD340,000 at 5% bonus and for Target C USD340,000 and above at 7% bonus. In AB26, for Target B, the amount was raised to USD200,000 - USD400,000 and for Target C to USD400,000. However, in AB29, the sales for Target A was reduced to USD160,000 and bonus was increased to 3%. For Targets B and C, the net sales target was reduced to USD320,000 although the bonus was maintained at 5% and 7% respectively. If the incentive bonus scheme was payable for the whole of Peninsular Malaysia including Kuala Lumpur, where the Airline's ticket sales would be invariably bigger, then it would be more probable for the sale targets set for the agent to achieve for the three years to be on escalating scale, instead of reducing the target from USD400,000 to USD320,000 for 1989 as in AB29.

Fourthly, despite the admission of it indebtedness to China Airline and its offers to pay outstanding debts by instalments, it seems to us that it did not occur to the agent to suggest to the Airline that it was entitled to set off any payment due to it under the incentive scheme. It only dawn on the agent to claim for the incentive scheme bonus as a PSA as well as GSA after it received the notice of termination of the GSA agreement from China Airline's solicitors dated 11 September 1989. Thus, it was only on 21 September 1989 that it submitted to China Airline the computation of its claim for the incentive bonus, both as a PSA and a GSA.

In the light of the above matters, in our view, the inescapable inference which could be drawn from the contemporaneous documents and the conduct of the parties gathered from the letters referred to above, was that there was no question of the agent being entitled to the incentive bonus both as a PSA and a GSA. In arriving at our conclusions, we have no doubt differed from the learned Judge. However, since the credibility of the agent's witnesses is not the main issue, we are justified in coming to a different conclusion because upon a review of the evidence as a whole, we find the learned Judge has misdirected herself in failing to give due considerations to the contemporaneous documents in assessing the probabilities of the case. Had she done so, the balance would tilt in favour of the appellant, China Airline.

In the result, we would allow this appeal with costs here and below. The judgment of the Court below dated 7 December 1993 ordering China Airline to pay the agent RM1,679,097.49 with interest at the rate of 8% p.a. from 11 September 1989 onwards is hereby set aside.

R.S. No. 02-5-1994 (Agent's Appeal)

In this appeal, the agent challenged the correctness of the learned Judge's decision on two grounds. The first ground related to the termination of the GSA agreement. It was the contention of learned Counsel that whilst appreciating that Article XV(2) and (3) form part and parcel of the GSA agreement, the learned Judge, however, erred in failing to hold that the reason given by China Airline in its letter of termination did not fall within Article XV(3) of the agreement. In short, it was submitted that there was no basis for China Airline to terminate the agreement because the agent was never in the state of insolvency.

Article XV(3) states:

> Notwithstanding the provisions of paragraph 2 hereabove, either party may terminate this agreement at any time if the other party becomes insolvent, makes a general assignment for benefit of creditors, or commits an act of bankruptcy, or if a petition in bankruptcy or for its reorganization or readjustment of its indebtedness be filed by or against it, or if a receiver, trustee, or liquidator of all or substantially all of its property be appointed or applied for.

In view of Article XV(3) above, China Airline wrote to the agent on 8 September 1989 terminating the GSA agreement, the material paragraph of the letter states as follows:

> Take notice that unless the full sum of $1,503,115.58 is paid to us as solicitors of our clients or to our clients directly by way of a Bankdraft within 48 hours from the date hereof, you will be deem to be unable to settle your debt and thereby in the state of insolvency. In such event, the aforesaid General Sales Agencies Agreement is deemed to be terminated and this letter is also served as a notice for such termination and legal action will also be taken against you to recover whatsoever sum due to our clients by you without further notice to you.

The learned Judge found ample evidence from correspondence passing between the parties, including the above mentioned letter, that the agent had failed to settle the outstanding amount with China Airline and having found also that the agreement was lawfully terminated, gave judgment against the agent for the sum of RM814 171.14 with interest at 8% p.a. from 14 June 1990.

In our opinion, the word "insolvent" as used in the agreement cannot have any technical meaning ascribed to it because it has no such meaning in our Bankruptcy Act 1967, where only the word "bankrupt" is used. (See s. 3(1) of the Act as to the "Acts of bankruptcy") Thus, "insolvent" by popular usage simply means unable to pay debts or if it is to be more formal, it means "unable to pay one's debts or discharge one's liabilities" *(The Shorter Oxford English Dictionary)*. Therefore, since the agent was unable to pay it outstanding debt despite the indulgence given by China Airline and consequent to the 48 hour notice given by the solicitors, it still failed to pay the sum demanded, in our view, the agent must be deemed to be insolvent. Hence, in our judgment, the GSA agreement, AB2-15, was lawfully terminated. Accordingly, we find no reason to interfere with the judgment of the Court below.

The second ground of appeal is substantially against the Bank regarding the Letter of Guarantee, AC4, which in part provides as follows:

Letter of Guarantee

> We **Perwira Habib Bank Malaysia Berhad,**, Cawangan Bandar, Tingkat Bawah Wisma Pahlawan, Jalan Sulaiman, 50000 Kuala Lumpur, hereby undertake to pay on demand to **Messrs China Airlines Limited** the sum of MYR400,000 (Malaysian Ringgit: Four Hundred Thousand Only) as may berequired for the due performance of the covenants in the contract between you and **Messrs Maltran Air Corporation Sdn. Bhd.** 79, 2nd Floor, Jalan Bukit Bintang, 55100 Kuala Lumpur. The said sum shall become payable by us in the event of the said **Messrs Maltran Air Corporation Sdn. Bhd.'s** failure to perform the said covenants.

The complaint of Encik Chandran was that the learned Judge had failed to appreciate that AC4 was a conditional guarantee, where by the express terms that:

> The said sum shall become payable by us in the event of the said **Messrs Maltran Air Corporation Sdn. Bhd.'s failure to perform the said convenants.**

the Bank was required to ensure that the agent had failed to perform the covenants under the agreement before paying out the said sum under the Guarantee. It was submitted that the obligation was on the Bank to have enquired to see if the agent had in fact breached the GSA agreement warranting the payment of RM400,000 under the Guarantee. If there had been this enquiry, the Bank would have discovered of the fact of the payment of RM1.6 million due to the agent under the judgment of the Court and therefore would have negated the allegation of any money due and payable by the agent to China Airline and thereby negated any case for payment under the Guarantee.

Encik Nantha Balan, for the Bank, submitted that AC4 was an unconditional "on demand" type of guarantee where liability to pay arose immediately upon a demand being made on the Bank by China Airline, who was the beneficiary under the Guarantee. It was submitted that the words:

> The said sum shall become payable by us in the event of the said **Messrs Maltran Air Corporation Sdn. Bhd.'s** failure to perform the said covenants.

did not demolish the unconditional on demand nature of the guarantee. They merely referred to the circumstance in which the beneficiary would be entitled to make a demand.

Alternatively, he submitted that if AC4 was a conditional guarantee, then the liability to pay would arise upon presentation of the appropriate documents asserting the existence of facts which would trigger off such liability. In this regard, Counsel submitted that China Airline in its letter of demand clearly had asserted that the agent was in breach of the covenant to pay under Article VII of the GSA agreement. Counsel relied on *Esal (Commodities) Ltd. & Anor. v. Oriental Credit Ltd. & Anor.* [1985] Lloyds's Rep. 546, where the English Court of Appeal at p. 550 accepted the proposition that in a conditional guarantee, in addition to the beneficiary under the guarantee making the demand, he must also inform the bank that he does so on the basis provided for in the performance bond itself.

A bank guarantee is a performance bond. There are two types of conditional bond whereby the guarantor becomes liable upon proof of a breach of the terms of the principal contract by the principal and the beneficiary sustaining loss as a result of such breach. The guarantor's liability will therefore arise as a result of the principal's default. The second type is an unconditional or "on demand" performance bond which is so drafted that the guarantor will become liable merely when demand is made upon him by the beneficiary with no necessity for the beneficiary to prove any default by the principal in performance of the principal contract. According to the learned authors of

The Modern Contract of Guarantee, 2nd Edn. p. 664, the tendency of the English Courts (since, according to the authors, that the Australian Courts have not yet been faced with the same problems of construction) has been to treat the performance bonds as unconditional if there was a clear statement that the amount guaranteed was payable by the bank simply upon a written demand being made, even though there might be some indications to the contrary elsewhere in the document. The learned authors cited *Esal (Commodities) Ltd's* case, where the bank "undertook to pay the said amount on your written demand **in the event that the supplier fails to execute the contract in perfect performance**" (emphasis added), it was held that the latter words did not alter the fact that the moneys were payable upon a written demand being made as stated in the earlier part of the clause. The beneficiary of the bond did not have to show a failure to perform by the supplier in order to claim upon the bond.

Esal is also an example of contractual interpretation of the words in a performance bond, the interpretation aspect of it was emphasised in the Supreme Court case of *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn. Bhd.* [1995] 1 MLJ 149.

In *IE Contractors Ltd. v. Lloyd's Bank Plc* [1990] 51 BLR 1, Staughton LJ was of the view that in cases of ambiguity, there was "a bias or presumption' that performance bonds were not payable upon proof of facts, but merely upon the presentation of the appropriate documents (that is, in the case of unconditional bonds upon the making of a written demand).

Returning to *Esal (Commodities) Ltd.* a case which we will place reliance on, the material words of the undertaking in the performance bond read:

> We undertake to pay the said amount on your written demand in the event that the supplier fails to execute the contract in perfect performance.

OCL, the appellant, contended that liability under the performance bond was conditional and that the condition had not been complied with. Mr. Tugendhat, Counsel for OCL, relied on the words in the undertaking immediately following "written demand":

> in the event that the supplier fails to execute the contract in perfect performance.

OCL contended that on the true construction of the performance bond, either: (a) There was no liability under the performance bond unless and until there had been a breach of the underlying contract of sale, and this was never established. Alternatively (b) that the beneficiary of the performance bond not only had to make a written demand for payment under and pursuant to the performance bond, but he must in the making of the demand assert that the demand was made because the supplier had failed properly to execute the contract.

Ackner LJ (as he then was), delivering the judgment of the Court of Appeal, stated (at pp. 549-550) as follows:

> As regards the first interpretation, Mr. Tugendhat is obliged to accept that if he is right, the bank, by entering into the performance bond is taking upon itself the obligation of deciding the merits of a dispute under a contract of sale, a function for which it is virtually common ground the bank is wholly unfitted and which the parties could not sensibly have intended. As Mr. Sumption for WF correctly submitted, if the performance bond was so conditional, then unless there was clear evidence that the seller admitted that he was in breach of the contract of sale, payment could never safely be made by the bank except on a judgment of a competent Court of jurisdiction and this result would be wholly inconsistent with the entire object of the transaction, namely to enable the beneficiary to obtain prompt and certain payment. There is no need to cite, at any length, the well-known case of *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.* [1978] 1 Lloyd's Rep. 166; [1978] 1 QB 159 as to the general nature of a performance bond, where it is stressed that a bank is not concerned in the least with the relations between the supplier and the customer nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not, the only exception being where there is clear evidence both of fraud and of the bank's knowledge of that fraud.

His Lordship added:

> However, I accept Mr. Tugendhat's alternative submission that in addition to the beneficiary making the demand, he must also inform the bank that he does so on the basis provided for in the performance bond itself.
>
> This interpretation not only gives meaning and effect to the words "in the event that the supplier fails ..." which otherwise would be mere surplusage, but it in no way imposes an extravagant demand upon the bank. A beneficiary may seek, honestly or dishonestly, to apply a performance bond to the wrong contract, and the need to inform the bank of the true basis upon which he is making his demand may be very salutary. Moreover, the desire for an extension of the performance bond may, on occasions, be due to the fact that the performance, for one reason or another, might have been justifiably delayed and the beneficiary does not yet know whether or not there will in due course be full compliance with the contract. The requirement that he must, when making his demand for payment in order to support his request for an extension, also commit himself to claiming that the contract has not been complied with, may prevent some of the many abuses of the performance bond procedure that undoubtedly occur. (See the observation of Mr. Justice Kerr (as he then was) in *RD Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd.* [1978] 1 QB 146 at p. 150).

In her grounds of judgment, the learned Judge recognised that AC4 is an "on demand guarantee". However, she held that because of the qualifying words in the latter part of the guarantee to the effect that the sum would become payable in the event of the agent' failure to perform the said covenants, the Bank was only obliged to pay if it was satisfied that the agent had defaulted

in its obligations under the GSA agreement. On that premise, the learned Judge proceeded to consider China Airline's letter of demand to the Bank and other documents to find out if the qualifying words under the Guarantee had been fulfilled. In the result, she found as follows (p. 74):

> AC12-13 is the formal demand stipulated for under the guarantee and it enclosed again AB40, AB47, AB48 and AB44 the plaintiff's letter addressed to the first defendant admitting the amount due and proposing payment by instalments. It is pursuant to AC12-13 that the second defendant made the payment and the question to be asked here is whether such payment out has been lawfully made under AC4. I reply that in the affirmative, as all that is required of the second defendant is to satisfy itself that the demand is made *bona fide* and faced with the contemporaneous correspondence of the first defendant and the plaintiff's unqualified written admission of the amount due, I consider that the payment out of the RM400,000 under the guarantee has been lawfully done. To that end, the plaintiff's claim against the second defendant to be indemnified for the RM400,000 paid out by the second defendant under the guarantee must fail.

From the above conclusion of the learned Judge, we form the view that she has construed AC4 as a conditional guarantee, although recognising that it is an "on demand' guarantee. However, in arriving at her conclusion that the payment out of the sum of RM400,000 under the said Guarantee was lawfully made, we find that she had applied the same approach as in *Esal,* where Ackner LJ accepted the alternative submission of Counsel for OCL that in addition to the beneficiary of the performance bond making the demand, he must also inform the bank that he does so on the basis provided for in the performance bond itself. Needless to say, in the circumstances of the present case, we consider this to be the correct approach. Here, to comply with the terms of the said Guarantee, the solicitors' letter to the Bank dated 14 November 1989 specifically demanded payment of RM400,000 under the said Guarantee giving the reason that the agent had failed to perform its part of the covenants under the GSA agreement. In addition to making this demand, the letter asserted that it was so made because under Article VII of the agreement, the agent had the unconditional responsibility for the due payment to the Airline of monies in respect of tickets sold which it had continuously failed to settle. The solicitors also enclosed in the demand letter the correspondence exchanged by the parties. In our view, the reference to the breach under Article VII of the GSA agreement in the letter of demand does give meaning and effect to the qualifying words in the Guarantee, i.e. in the event of the agent's failure to perform the covenants in the agreement. Thus, on the above grounds, we are satisfied, as did the learned Judge, that the qualifying words in the latter part of the Guarantee have been fulfilled.

In the result, we agree with the reasons and conclusion of the learned Judge that the payment out of the sum of RM400,000 under the said Letter of Guarantee had been lawfully made.

Accordingly, we dismiss this appeal with costs.

Reported by Gan Peng Chiang